

\* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

November 28, 2005

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: March 31, 2005

Case Number: TSO-0216

This decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter "the Individual") for continued access authorization. This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual's suspended access authorization should be restored. For the reasons detailed below, it is my decision that the Individual's access authorization should be not be restored.

**I. APPLICABLE REGULATIONS**

The regulations governing the Individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."

An individual is eligible for access authorization if such authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). "Any doubt as to an individual's access authorization eligibility shall be resolved in favor of the national security." *Id.* See generally *Dep't of the Navy v. Egan*, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of national security" test indicates that "security-clearance determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9<sup>th</sup> Cir. 1990) (strong presumption against the issuance of a security clearance). Thus, the standard for eligibility for a clearance differs from the standard applicable to criminal proceedings in which the prosecutor has the burden of proof.

If a question concerning an Individual's eligibility for a clearance cannot be resolved, the matter is referred to administrative review. 10 C.F.R. § 710.9. The individual has the option of obtaining a decision by the manager at the site based on the existing information or appearing before a hearing officer. 10 C.F.R. § 710.21(b)(3). Again, the burden is on the individual to present testimony or evidence that he is eligible for access authorization, i.e., that access

authorization will not endanger the common defense and security and will be clearly consistent with the national interest.” 10 C.F.R. § 710.27(a).

## **II. BACKGROUND**

The Individual has been employed by a contractor at a DOE facility in a position which requires him to have an access authorization. In August 1998, the Individual signed a “Questionnaire for Sensitive Positions” (QNSP) in which he stated that he had not used illegal drugs in the past seven years. DOE Exhibit (Ex.) 11. In February 1999, the Individual signed a Letter of Interrogatory (LOI) in which he stated that he used marijuana and cocaine between 1976 and 1984. DOE Ex. 10. In February 1999, the Individual also signed a Drug Certification Form in which he promised that he would not use or become involved with any illegal drugs. DOE Ex. 9. In April 2004, the Individual was the subject of a personnel security interview (PSI). During that PSI, the Individual stated that, other than when he smoked marijuana once in 2001, he had not used illegal drugs since 1984. DOE Ex. 8 at 83, 94; DOE Ex. 16; *see also* Hearing Transcript (Tr.) at 18, 64, 76. As a result of the preceding information, the Individual was referred to a DOE-consultant psychiatrist (the Psychiatrist) for an evaluation.

In May 2004, the Psychiatrist interviewed the Individual and, in June 2004, issued a report. In his report, the Psychiatrist concluded that, at the time of the evaluation, the Individual did not have a substance abuse or dependence disorder. DOE Ex. 6. However, the Psychiatrist noted that the Individual stated that he had used marijuana in the past. The Psychiatrist questioned the Individual extensively about his marijuana use. *Id.*

In January 2005, the DOE notified the Individual that information in his August 1998 QNSP, February 1999 LOI, February 1999 Drug Certification Form, April 2004 PSI, and the Psychiatrist’s June 2004 report constituted derogatory information that created a substantial doubt as to the Individual’s continued eligibility for access authorization under 10 C.F.R. § 710.8(k) and (l) (Criteria K and L). Notification Letter, January 20, 2005. Upon receipt of the Notification Letter, the Individual requested a hearing in this matter. *See* DOE Ex. 4. The DOE forwarded the request to the Office of Hearings and Appeals (OHA). The OHA Director appointed me to serve as the hearing officer.

A hearing was held in this matter. At the hearing, the Individual represented himself. The Individual offered his own testimony, as well as that of his wife, two friends, and his treating physician. The local DOE office presented one witness, the Psychiatrist.

## **III. STANDARD OF REVIEW**

Under Part 710, the DOE may suspend an individual’s access authorization where “information is received that raises a question concerning an individual’s continued access authorization eligibility.” 10 C.F.R. § 710.10(a). After such derogatory information has been received and a question concerning an individual’s eligibility to hold an access authorization has been raised, the burden shifts to the individual to prove that “the grant or restoration of access authorization to the Individual would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.27(a).

Derogatory information includes, but is not limited to, the information specified in the regulations. 10 C.F.R. § 710.8. In considering derogatory information, the DOE considered various factors including the nature of the conduct at issue, the frequency or recency of the conduct, the absence or presence of reformation or rehabilitation, and the impact of the foregoing on the relevant security concerns. 10 C.F.R. § 710.7(c). The ultimate decision concerning eligibility is a comprehensive, common sense judgment based on a consideration of all relevant information, favorable and unfavorable. 10 C.F.R. § 710.7(a).

#### **IV. SECURITY CONCERN**

The derogatory information concerning Criteria K and L centers on the Individual's past use of illegal drugs. Criterion K concerns conduct indicating that the Individual "trafficked in, sold, transferred, possessed, used or experimented with a drug or other substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 ... except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine, or as otherwise authorized by Federal law." 10 C.F.R. § 710.8(k). Criterion L concerns conduct tending to show that the Individual was "not honest, reliable, or trustworthy, or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the Individual to act contrary to the best interests of national security." 10 C.F.R. § 710.8(l).

It is beyond dispute that use of illegal drugs raises security concerns. *See, e.g., Personnel Security Hearing, Case No. VSO-0113*, 25 DOE ¶ 85,512 (1995) ("The drug user puts his own judgment above the requirements of the laws, by picking and choosing which laws he will obey or not obey. It is further the concern of the DOE that the drug abuser might pick and choose which DOE security regulations he will obey or not obey with respect to protection of classified information."). Furthermore, drug use calls into question the user's judgment and reliability. *See, e.g., Personnel Security Hearing, Case No. VSO-0023*, 25 DOE ¶ 82,761 (1995) (stating that "any drug usage while the individual possesses a [security] clearance and is aware of the DOE's policy of absolute abstention demonstrates poor judgment.").

The Individual's admissions that he had used illegal drugs in the past and the inconsistency in his statements about his drug usage, as documented in the Notification Letter, gave rise to security concerns regarding the Individual's drug use and trustworthiness, judgment and reliability. Accordingly, the local security office had more than sufficient grounds to invoke Criteria K and L.

#### **V. FACTS**

In August 1998, the Individual indicated on his QNSP that he had not used any illegal drugs in the past seven years and that he had never used illegal drugs while holding a security clearance. DOE Ex. 11. During an April 2004 PSI, the Individual stated that, prior to an admitted one-time use in 2001, he had not used marijuana or illegal drugs since 1984. DOE Ex. 8 at 83, 94; DOE Ex. 16. However, during his evaluation by the Psychiatrist, the Individual indicated that he had,

in fact, used marijuana several times between 1984 and 2001. The relevant portion of the Psychiatrist's report is as follows:

I asked the subject to give me a history of his marijuana use. He told me that he went to California in 1975 and "may have used in the late 1970s," although he added that he really got exposed more to it in the early '80s. When asked the frequency of the use, he said that he used on the weekends a few times a month. He told me that things changed when he got married in 1985. He said that his marijuana use tapered off and that he would only use it if he was with someone else that was using it. He said that the someone else would never be his wife. I then asked, "When did you stop your use of marijuana?" He said, "In 2001." I then asked him, "Between 1985 and 2001, how many times did you use marijuana?" He answered, "Maybe a hundred." I then asked, "How many times have you used in the last five years?" He answered, "More than I can count on one hand." I asked, "What were the circumstances or contexts?" He said, "A guy I met." I asked, "What about the other times?" He said, "At parties, being with people, hanging out."

\* \* \*

I then asked him, "In the past five years, if you used marijuana more than five times, what were the circumstances?" He said, "One with a [person] in a sexual situation, [they] had it." He then said, "One at a party in . . . [a local area]. I was with someone I worked with and we went to someone else's house." I asked him about the other circumstances. He said, "They were sexual situations with other [people] where we ended up in motel rooms."

\* \* \*

I told him he had told me that he used marijuana "more times than I can count on one hand" in the last five years. He responded, "Oh, no. No more than two." I told him that he said those exact words to me . . . He said that maybe it was more than two but he should not have said that it was more than he could count on one hand. I asked him, "When is the last time that you used marijuana?" . . . I told him that he wrote on his QNSP and said in the PSI that it was in May of 2001. He said, "Oh, yeah, could have been in spring of 2001." I asked him, "Have you used it at all since then?" He answered, "No."

DOE Ex. 6 at 23, 26-27. In February 1999, the Individual signed a Drug Certification form in which he promised not to use illegal drugs in the future. DOE Ex. 9. However, as stated above, the Individual admitted in his PSI and to the Psychiatrist that he had used marijuana after signing the Drug Certification form. See DOE Ex. 6 at 23, 26-27; DOE Ex. 8 at 83, 94; DOE Ex. 16. During his April 2004 PSI, the Individual would not give his assurance that he would never use illegal drugs in the future. He stated, "I don't know whether I could make that promise, to be honest, you know, to be honest, honestly answer it, you know . . . I mean, I, let me put it this way,

I don't have any plans at the moment to do it again ...” DOE Ex. 8 at 126. The Individual reluctantly gave his assurance to the Psychiatrist that he would not use illegal drugs in the future. In his report, the Psychiatrist stated:

I then asked him, “What is your intent regarding the use of illegal drugs in the future, while you are holding a ... ‘Q’ access authorization?” He said, “I seriously doubt that I’ll do that again.” I said, “Seriously doubt? Can you give me an assurance that you will definitely not do it again?” He said, “Probably 99.9%” I said, “Probably 99.9%. Why not 100%?” He said, “Okay, I will call it 100%. I don’t see myself exposed to it.” I told him that in the [PSI], he seemed non-committal in giving his assurances that he would not use again while “Q” cleared. His response was, “The last time I turned it down and I don’t think I will have the exposure in the future.”

DOE Ex. 6 at 27. The Psychiatrist was concerned by the fact that the Individual based his assurance that he would not use marijuana in the future on his belief that he would not be exposed to it. *Id.* at 27 n. 40.

## **VI. HEARING TESTIMONY**

The Individual did not dispute the matters giving rise to the Notification Letter. He did dispute, however, the Psychiatrist’s statement that he (the Individual) said he used marijuana more than one hundred times between 1985 and 2001. He stated that he must have misunderstood the question or believed the Psychiatrist was referring to something else. The Individual also stated that he did not use drugs and would not do so in the future. The following is my discussion of the relevant hearing testimony.

### **A. The Individual**

The Individual stated that he did not use any illegal substances between 1984 and 2001. Tr. at 18. He stated that he believed he may have misunderstood the Psychiatrist’s question when he answered at the examination that he had used a substance “maybe a hundred” times. The Individual said that at the time of his evaluation he may have believed that the Psychiatrist was asking him about his use of legal, over-the-counter inhalants, also known as “poppers.” *Id.* at 19. The Individual stated,

“[W]e had spoken about inhalants...I used inhalants, okay, which are over-the-counter...They weren’t illegal. I might have said, ‘Oh, yeah, I used them a hundred times or over a hundred times,’...Yeah, when I saw that in the report, I was going, ‘Where did that hundred times come from?’ In fact, the OPM investigator asked me that, and I said, ‘I have no idea, because I don’t’ – you know, I – you know, 1984 to 2001, and from 2001 on – or 2002 on – you know, until today, I am totally, you know, without – without illegal substance use.

*Id.* at 19-20. The Individual admitted that he used marijuana “a couple of times” in 2001. *Id.* at 75. When asked why he previously stated that he only used marijuana once in 2001, the

Individual attributed the discrepancy to a misunderstanding of the wording of the question. He stated, “I was just referring to – you know, I was trying to refer to when I used the marijuana usage and, you know, I wasn’t referring specifically to the number of times.” *Id.* at 79. The Individual also indicated that he possibly had latent memory problems as a result of a prior illness. *Id.* at 85-86. The Individual asserted that he had no intention of using drugs in the future. *Id.* at 69, 72.

**B. The Individual’s Wife**

The Individual’s wife stated that the Individual’s character for trustworthiness was “very good.” *Id.* at 54. She also stated that she had never noticed any illegal drug use by the Individual. *Id.* The Individual’s wife stated that as far as she knew, there was “no smoking, drinking, [or] drugs.” *Id.* at 57. The Individual’s wife also stated that she was not aware of the Individual’s casual sexual encounters until 1999. *Id.* at 58. She also stated she was not aware whether the Individual continued having those encounters. *Id.* at 61.

**C. The Friends**

Two of the Individual’s friends testified at the hearing. Both testified that they did not recall ever seeing the Individual use illegal drugs or having a problem with illegal drugs. *Id.* at 38, 46. Both friends also stated that they believed the Individual was very honest and trustworthy. *Id.* at 40, 47.

**D. The Individual’s Physician**

The Individual’s physician testified that she examined the Individual several times a year. *Id.* at 51. She stated that she has never detected any illegal drug usage by the Individual. *Id.* at 50.

**E. The Psychiatrist**

The Psychiatrist testified about what the Individual told him during his evaluation. According to the Psychiatrist, the Individual stated that he had used marijuana about one hundred times in the period between 1985 and 2001. *Id.* at 11, 13. The Psychiatrist stated that the Individual told him that, in the past five years, he had used marijuana more times than he could count on one hand. *Id.* at 11. The Psychiatrist disagreed with the Individual’s claim that the Individual confused his questions about marijuana with his questions about over-the-counter inhalants. He stated:

I write these reports myself, and I am sitting there at a computer looking at my notes and writing, and I always write things in the order that they happen, and so we didn’t even start talking about poppers...until after the discussion with marijuana was over. So there is no possible way that, in my opinion, you could confuse my marijuana questions with the popper questions, because they hadn’t even come up yet, just looking at the chronology.

*Id.* at 23. The Individual told the Psychiatrist that most of his drug usage occurred during casual or anonymous sexual encounters. *Id.* at 14, 25. When asked whether the Individual gave him the impression that he could refrain using drugs if they were presented to him during one of his sexual encounters, the Psychiatrist stated:

He wasn't very strong that he would not refrain from it. I got the impression that he knows he's not supposed to do it, and he would do his best, but it wasn't that he could tell me 100 percent, and he was saying 99 point something, and I said "Well, why can't it be a hundred?" And then, eventually, he said a hundred, but the sense I had, you know, in interviewing him, is that in some of these, you know, sexual encounters, the other person has drugs with them and offers and that it would be difficult to turn down, but, eventually, he said he could turn it down – he was a hundred percent sure he could.

*Id.* at 14-15. The Psychiatrist stated that the Individual understood the seriousness of using drugs while holding a security clearance. *Id.* at 15. When asked his opinion about whether the Individual would refrain from using drugs in the future, the Psychiatrist indicated that the Individual was "a much higher risk than someone else for using illegal drugs because of the context in which he uses them." *Id.* at 16. The Psychiatrist also believed that, at the time of the evaluation, the Individual was not completely forthright with him. *Id.* at 27.

## VII. ANALYSIS

The Individual did not dispute the general issues giving rise to the Notification Letter. Rather, he maintained that he had no interest in illegal drugs and would refrain from using drugs in the future. The only issue to be resolved, then, is whether the Individual has presented adequate evidence to mitigate the security concerns.

### A. Criterion K

The hearing testimony and the documents do not support the Individual's assertion that he will refrain from using illegal drugs in the future. The Individual admitted that his drug usage occurred during casual or anonymous sexual encounters. *Id.* at 14, 25. The Individual also indicated that he continues to have such encounters. *Id.* at 68-69. An employee's personal lifestyle alone is not a factor in determining that employee's eligibility for a security clearance. In fact, the DOE does not concern itself with the lifestyle choices, sexual orientation or sexual preferences of its employees. However, in this case, the Individual's lifestyle is of concern to the DOE because of the substantial nexus between his casual sexual encounters and the Individual's use of illegal drugs.

The Psychiatrist was concerned that the Individual was a high risk for illegal drug use in the future. According to the Psychiatrist, the Individual poses a higher risk for using illegal drugs because of the context in which he uses them. *Id.* at 16. The Psychiatrist believed that the Individual was unlikely to be able to resist using illegal drugs if he was offered those drugs by a partner during a sexual encounter. *Id.* at 24. Taken in connection with the Psychiatrist's opinion, the Individual's statement that illegal drugs are not a factor in "most" of his casual

sexual encounters is problematic. *See id.* at 65-66. The statement indicates that, while drugs are not always involved, some of the people that the Individual chooses as sexual partners do use illegal drugs and do offer illegal drugs to the Individual. This tends to show that the Individual may be tempted to use illegal drugs in the future and, as shown by his past encounters, he may not always be able to resist that temptation.

In his June 2004 report, the Psychiatrist was also concerned by the fact that the Individual based his assurances that he would not use illegal drugs on the fact that he would not be exposed to it in the future. *See* DOE Ex. 6 at 27 n. 40. I share that concern. As mentioned above, the Individual stated that he continued to have casual or anonymous sexual encounters. The Individual cannot control whether his partner brings drugs to the situation. The Individual stated that he no longer had an interest in any illegal drugs. Tr. at 69. However, despite his statement that he would not use any illegal drugs in the future, he was unable to provide sufficient evidence to show that in future sexual encounters, if presented with drugs, he would be able to refrain from using them. In his PSI and during his evaluation by the Psychiatrist, the Individual somewhat reluctantly gave his assurance that he would not use drugs in the future. I do not believe that this is a sufficient insurance against a repeat of illegal drugs use.

In sum, the testimony and evidence tends to show that the Individual has not provided a convincing case that he will refrain from using illegal drugs in the future. Consequently, I find that the Individual has not successfully mitigated the Criterion K concern.

## **B. Criterion L**

There is one main security concern arising under Criterion L derogatory information. Specifically, the inconsistencies in the Individual's statements regarding his past drug usage raise a concern as to his trustworthiness and reliability.

With regard to the Individual's statements about his prior drug usage, I am unconvinced by the Individual's explanation regarding the inconsistencies in those statements. As mentioned above, the Individual stated on his QNSP that he had not used illegal drugs while holding a security clearance. *See* DOE Ex. 11 at 8. Also, during his PSI, the Individual stated that, other than his admitted 2001 use, he had not used any illegal drugs since 1984. *See* DOE Ex. 8 at 83, 94; DOE Ex. 16. However, during his psychiatric evaluation, he told the Psychiatrist that he had used marijuana about 100 times between 1985 and 2001 and that in the past five years he had used marijuana more times than he could count on one hand. The Individual's explanation – that he misunderstood the questions – is unconvincing. While the Individual did submit a negative urine drug test from December 2004 (Ex. C) and a letter from his physician indicating that the physician found no evidence of illegal drug use since accepting him as a patient in 1999 (Ex. B), this is not sufficient evidence to disprove the statements he made to the Psychiatrist. The Individual also submitted a copy of an Office of Personnel Management Report of Investigation that contains summaries of interviews with people who know the Individual (Ex. A). Given the context of the sexual situations where the Individual may use illegal drugs, this evidence is of limited value. Whether the inconsistencies in the Individual's statements were the product of a faulty memory or a deliberate attempt at deception, I remain unconvinced that the DOE can rely on the Individual to provide honest and accurate information regarding his use of illegal drugs in



the future. Consequently, I do not find that the Criterion L security concern has been sufficiently mitigated.

### **VIII. CONCLUSION**

The Individual has not resolved the Criteria K and L concerns cited in the Notification Letter. Therefore, I cannot conclude that restoring the Individual's access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Consequently, the Individual's access authorization should not be restored. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Richard A. Cronin, Jr.  
Hearing Officer  
Office of Hearings and Appeals

Date: November 28, 2005